

1 proposed.

2 The next three are joint use agreements.

3 JUDGE SIPPEL: That's 33, 34, and 35?

4 MR. SEIVER: No, I'm sorry. Thirty-two,
5 33, and 34.

6 JUDGE SIPPEL: Oh, I'm sorry. Yes, I see
7 what you say. Thirty-one is the Alabama case.

8 MR. SEIVER: The Alabama Power case.

9 JUDGE SIPPEL: And now you're into 32,
10 30 --

11 MR. SEIVER: Three and 34.

12 JUDGE SIPPEL: Yes, sir.

13 MR. SEIVER: Those are all three joint use
14 agreements. I have not been able to confirm that
15 these are identical to the ones I believe that we have
16 offered and used, but two of them to the extent that
17 they are deposition exhibits, and I don't know. I
18 thought the GTC one was as well, but I could be wrong.

19 It was?

20 PARTICIPANT: I thought it was.

21 MR. SEIVER: Okay. It's just not listed.
22 We have no problems with those four

1 exhibits. So if Your Honor would like to --

2 JUDGE SIPPEL: Thirty-one is okay. Thank
3 you. And 32 through 34 are okay.

4 MR. LANGLEY: Your Honor 31 through 34
5 admitted?

6 JUDGE SIPPEL: Yes, and your proffer, I
7 understand the relevance of 31, but what about just a
8 quick reference to relevance on 32 to 34?

9 MR. LANGLEY: A couple of reasons, not the
10 least of which, again, are these construction issues
11 and how these poles are designed and who is supposed
12 to go where.

13 Also relevant to the point, a very
14 important point in this proceeding, about the space
15 that is contracted to incumbent local exchange
16 carriers, which is what Bell South, Sprint and GTC
17 are.

18 Third, they are relevant to the rate
19 quest. In other words, what is the proper rate here?
20 And our expert will testify. We'll fold those into
21 the analysis.

22 JUDGE SIPPEL: Of the rate?

1 MR. LANGLEY: Of the rate because it's an
2 unregulated market. I'll answer the relationship
3 between the electric utility and an IOF is not
4 regulated with respect to pole attachment charges.

5 JUDGE SIPPEL: All right. I mean, the
6 proffer to me, it's a valid proffer, Mr. Seiver, and
7 we've already discussed this.

8 MR. SEIVER: I'm sorry. This is just
9 secondary. I'll make it very quick, Your Honor.

10 Our point on the joint use agreements is
11 that it's not really an unregulated market in the
12 sense that they are using it, that it is an improper
13 comparison, and our witnesses will pull that out.

14 But the other thing that's critical that
15 I just wanted to make sure is clear on the record,
16 what rate another attacher pays to Gulf Power and the
17 circumstances of that have nothing to do with the
18 entitlement to more than marginal cost on a full pole
19 where there is some quantifiable lost opportunity.

20 So in that sense, they say the rate is
21 relevant to their case. We think it has nothing to do
22 with it.

1 JUDGE SIPPEL: Okay.

2 MR. CAMPBELL: Your Honor, I might add I'm
3 a little confused. Is there an objection to Exhibits
4 32 through 34? Because these were also on your
5 exhibit list, taken off of your exhibit list pursuant
6 to the scheduling order and put on ours. So I'm a
7 little confused as to why we're arguing about --

8 MR. SEIVER: Mr. Campbell, please. I was
9 just making my point in response to the proffer of
10 relevance. I did not want that proffer to come in.
11 I'm using it for something else completely different
12 than you.

13 MR. CAMPBELL: I'm just trying to clarify.

14 JUDGE SIPPEL: All right. That's enough.
15 That's enough. You can have your discussions outside
16 in the corridor.

17 I just want to make the point again that
18 all I'm trying to do is determine what documentary
19 evidence is qualified to be received in evidence in
20 this proceeding. I am not trying to do anything more
21 than that.

22 So your comments are not out of order, but

1 they're really unnecessary at this particular point in
2 time.

3 Now, let me get some business done here
4 now. Exhibits No. 31 through 34, which are identified
5 by tabs in Gulf Power's Notebook 3 of 5 are deemed
6 marked for identification as Gulf Power's Exhibit Nos.
7 31 through 34 and are received in evidence as Gulf
8 Power Exhibits No. 31 through 34.

9 (Whereupon, the documents
10 referred to were marked as Gulf
11 Power Exhibit Nos. 31 through 34
12 for identification and were
13 received in evidence.)

14 JUDGE SIPPEL: Now, that takes us down to
15 whatever the next block, which is starting with Number
16 35. Let me ask the question. Numbers 35 through 46,
17 that's what's left in this particular notebook we're
18 looking at. Are there any other tab exhibits, Mr.
19 Seiver, or block thereof that you, again, have a
20 strong objection to?

21 MR. SEIVER: Well, 35, 36, and 37, Your
22 Honor, I believe are demonstrative exhibits. They are

1 not evidentiary in the sense that they were somehow or
2 other part of the initial production or use or
3 reliance at any point in time relevant, but were
4 created, and perhaps Mr. Campbell and Mr. Langley can
5 explain that to us for purposes of witnesses'
6 testimony having a chart to look at.

7 And so I would object to a demonstrative
8 evidence exhibit being admitted into evidence, but I
9 have no objection to it being used or being marked.

10 MR. CAMPBELL: Your Honor, I think that's
11 fair. We can pull those back, use them as
12 demonstrative exhibits. That was their intended
13 purpose.

14 And I hate to double back because we're
15 making such good progress, but for purposes of clarity
16 on the exhibits that were just admitted, I wasn't
17 trying to quibble with Mr. Seiver a moment ago. I was
18 trying to establish for record purposes whether there
19 was an objection to those documents.

20 JUDGE SIPPEL: Yes.

21 MR. CAMPBELL: And I don't know whether
22 there was one and it was overruled or whether there

1 wasn't an objection. And so for purposes of clarity,
2 Mr. Seiver, was there an objection to the joint use
3 agreements coming into evidence?

4 MR. SEIVER: My objection was for the
5 relevance of the proffer of them using it in the way
6 they described, and if that was the only relevance,
7 then I objected to the admission.

8 JUDGE SIPPEL: Well, I think my ruling
9 receiving them into evidence overrules an objection to
10 relevance. I mean, they're relevant for the broad
11 purposes of receiving them into evidence here, and if
12 there's a ruling that you want, I'll overrule the
13 objection.

14 Now, let's get back to 35 to 37. You
15 agree with Mr. Seiver that these are basically
16 demonstrative documents, demonstrative evidence
17 documents.

18 MR. CAMPBELL: Your Honor, Gulf Power will
19 withdraw Exhibits 35, 36, and 37, and we'll reserve
20 the right to use them as demonstrative aids at trial.

21 MR. SEIVER: Just to help us, rather than
22 withdrawing them could we just say they're

1 demonstrative so that we don't change all of the other
2 numbers?

3 MR. CAMPBELL: I think we should retain
4 the numbers, sure.

5 JUDGE SIPPEL: Well, the numbers would
6 stay, but what would be your objection to going along
7 with Mr. Seiver's approach? Why not just mark them
8 and receive them at this time?

9 MR. CAMPBELL: I have no objection to
10 that. I think they are noncontroversial documents.
11 I mean, they're --

12 JUDGE SIPPEL: Don't say too much more
13 because --

14 MR. CAMPBELL: I agree.

15 JUDGE SIPPEL: That's all right. Based on
16 just what I'm hearing here, these are demonstrative
17 documents. I will accept them as that, as qualifying
18 as demonstrative evidence, and since there is nothing
19 really controversial at this point in time, I'm going
20 to receive them into evidence as they have been marked
21 and, again, primarily for purposes of just
22 facilitating this proceeding at this point.

1 So anyway, the documents which have been
2 tabbed as Gulf Power's 35 through 37, and again, these
3 are Gulf Power's Notebook 3 of 5, are identified as
4 Gulf Power Exhibits Nos. 35 through 37 and are
5 received in evidence as Gulf Power's Exhibits 35
6 through 37.

7 (Whereupon, the documents
8 referred to were marked as Gulf
9 Power Exhibit Nos. 35 through 37
10 for identification and were
11 received in evidence.)

12 JUDGE SIPPEL: Now, that takes us to 38.
13 Is there a logical block of tabbed documents in this
14 volume that you want to refer to or object to, Mr.
15 Seiver?

16 MR. SEIVER: Your Honor, I believe on
17 Exhibit 39 this is another document that I guess we'll
18 find out at hearing. We don't know who made it or who
19 prepared it. That was just something that if the
20 explanation said, you know, prepared -- it may be for
21 all I can tell another one of the demonstrative
22 exhibits or something that is a compilation from other

1 exhibits. I can't tell.

2 JUDGE SIPPEL: Well, we have got 39
3 flagged. Is there any other in there that we need to
4 flag?

5 MR. SEIVER: Your Honor, I believe the
6 rest through this volume are going to be not
7 controversial at all, including 38, which was the
8 NESC, but the other documents seem to do with -- I'm
9 sorry.

10 MR. COOK: Your Honor, to the extent we're
11 jumping to the end of the volume, if I can address
12 just a couple of points on the record, Tab 40 contains
13 some -- let's see. This was fine. Sorry.

14 Tab 41, Osmose status reports, I just note
15 here that there are -- and, Russ, correct me if I'm
16 wrong -- there are some status reports that we hadn't
17 seen at the Osmose deposition but that you were able
18 to find?

19 MR. CAMPBELL: As you know, we, for
20 purposes of attempting to authenticate the backup data
21 which has now been stipulated to, we called Osmose and
22 asked to talk to another witness, Mr. Ken McVearry.

1 During those conversations, in an effort to elicit his
2 prefiled written direct testimony on an authenticity
3 issue, he revealed that he, in fact, had some copies
4 that were missing and had not been located in Gulf
5 Power's files. I think it was two, three, and 12 in
6 a series of 15 reports.

7 As soon as we got those, they were
8 attached and flagged and identified in his direct
9 testimony, and you received them with the exhibits.

10 MR. COOK: Right. You know, subject to
11 Mr. Seiver's general objection about the relevance of
12 all materials related to Osmose and its not tying to
13 the APCo test, 41 we have no further objection to
14 except to note that we did get a couple of these
15 status reports again for the first time last Friday.

16 Forty-two is a filing which includes
17 photographs and data, and the photographs, I will
18 accept Gulf's representation that they're the same
19 photographs as they produced to us on January 20th.

20 The data that comes with it has been
21 rewritten in a different format that we, again, have
22 seen for the first time last Friday. Now, counsel for

1 Gulf Power may represent to Your Honor that this
2 rewriting exactly parallels the charts that were
3 produced to Your Honor and to us on January 20th with
4 their 50 full identification. Obviously, having
5 received them Friday we haven't had a chance to
6 compare the charts yet and to see whether, in fact,
7 this data as represented is the same as was given to
8 us previously.

9 So we will look --

10 JUDGE SIPPEL: Well, let's hear a proffer
11 from Mr. Campbell.

12 Can you response to what Mr. Cook is
13 specifically asking about?

14 MR. CAMPBELL: With respect to that last
15 statement, I will respond by saying I believe it is
16 explained in the written prefiled direct testimony of
17 Mr. Ben Bowen and will be further explained by him
18 when he takes the stand. That is a recapturing of the
19 same data that was produced to them. He did it in a
20 different form because he found it easier for him to
21 comprehend as he was preparing his testimony.

22 We will tender that exhibit as a summary

1 of voluminous records consistent with the Federal
2 Rules of Evidence. Mr. Bowen will, of course, be on
3 the stand and available for them to cross examine him
4 about the foundational requirements to admit it, but
5 I think for purposes of our proceeding here today, it
6 should be admitted.

7 He has the right to cross examine him. It
8 is a summary of the same data that they have.

9 JUDGE SIPPEL: All right. The bottom line
10 is that he's proffering that it's the same data. It's
11 just in a little different format, and if that proffer
12 turns out to be, you know, substantially inaccurate in
13 some sense of when you're conducting your cross
14 examination, you know, we'll come back to it then.
15 Otherwise if it's an objection I'm overruling it.

16 That takes us to 42. What about 43
17 through 46?

18 MR. COOK: Yes, Your Honor. Forty-three
19 as the next one, this is an exhibit, Gulf Power's 50
20 pole identification, which is one of the main filings
21 submitted to Your Honor in this case, and again, this
22 would be or should be the full extent of the materials

1 filed by hard copy and electronically with you on
2 January 20th of this year. In fact, it's something
3 that we had on our exhibit list, but then pursuant to
4 the sensible crossing off of at least most of the
5 overlapping things -- we wanted to have a couple of
6 things of our own -- we crossed it off ours and they
7 put it in.

8 The one thing I'll note about this, having
9 gotten this Friday and 43, is I can see from paging
10 through it, having spent many hours pouring over this
11 that 43 is incomplete in the sense that when that
12 filing came into us first electronically through a
13 colleague of Messrs. Langley and Chapman -- Campbell
14 named Nate Chapman, who has appeared before Your Honor
15 before, but who is no longer involved in this case;
16 Mr. Chapman sent me about 18 or 20 E-mails and the E-
17 mails had headings like "Knology Make Ready 1, 2, 3,"
18 and it went from four I remembered up through about 14
19 or 16.

20 And when you printed those out, you saw
21 some things that were very interesting to us as a
22 party. For example, there are pages on the Knology

1 printouts that say, "Bill Knology in full for cost of
2 make ready. Total cost to Gulf Power equals zero."

3 That's very significant to us because
4 we're looking to show you that they have no proof that
5 they are out more money in the language of APCo, that
6 they have no loss under the Constitution.

7 Those pages are not in this Tab 43, and
8 therefore, I know that it's at least partly
9 incomplete. Now, you may say, "I direct you, Mr.
10 Cook, to go back and do a comparison," and we'd be
11 happy to do that, but I would note for the record that
12 43 is incomplete.

13 MR. LANGLEY: That is news to us if it is
14 incomplete, and it certainly was not the intent, and
15 we would be satisfied with whatever the 50 pole ID was
16 to be what we intend to offer as Exhibit 43. I
17 frankly don't know what Mr. Cook is talking about.

18 If there is a discrepancy, then we can
19 work it out and make sure that it's complete.

20 JUDGE SIPPEL: If I'm hearing you, Mr.
21 Cook, it sounds to me that you're concerned because
22 they've subtracted something from this proffer.

1 MR. COOK: That's exactly right, and --

2 JUDGE SIPPEL: Well, how does that hurt
3 you?

4 MR. COOK: Well, you know, you might say,
5 well, you can just take the materials and use it on
6 cross, and we might do that. But to the extent that
7 they're representing that this for the record is the
8 full 50 pole identification. It's very important in
9 case a witness has testified to it, ours or theirs,
10 and I know that ours will because they refer to it in
11 their direct written testimony.

12 If you were to turn as the trier of fact
13 to try to find something in here and say, "Well, where
14 is it in Gulf's filing?" you might say, "Well, it's
15 not here. I'm not sure I believe Complainants'
16 witnesses."

17 So that's an important foundation.

18 JUDGE SIPPEL: So that I understand, I
19 mean, I understand what your explanation is about the
20 difference between, you know, several weeks ago and
21 last week, but I don't understand. I think that it
22 would be more of a concern to Gulf Power than it would

1 be to you.

2 MR. COOK: It's really -- I've really
3 noted the full objection. It's one really that is
4 based on completeness and accuracy of representation
5 to you as the trier of fact. If Mr. Langley says it's
6 intended to be the whole thing, then I would submit it
7 is not the whole thing.

8 MR. CAMPBELL: We are going to
9 conditionally move to admit it based on completing the
10 exhibit consistent with his concerns. We wanted a
11 complete exhibit. We have no problem with it. I
12 don't think we have a dispute here.

13 JUDGE SIPPEL: Well, I'm going to -- I
14 mean if it's an objection, I'm going to overrule it.
15 I think it's more in the nature of a commentary with
16 respect to the completeness of an exhibit. I'm going
17 to receive it into evidence subject to the proffer of
18 Mr. Campbell and let's see what happens.

19 That's Number 43. Now we've got 44
20 through 46. I'm still trying to get to the end of the
21 volume. I'm going to come back and do a ruling on
22 this, you know. I'm just -- go right ahead.

1 MR. COOK: Your Honor, 44 I don't think we
2 have any problem with. Forty-five I don't think we
3 have a problem with, again, subject to the general
4 objection.

5 I would just ask a question to Gulf
6 Power's counsel. Is 45 a new document or does that
7 come from something that was produced?

8 MR. CAMPBELL: I think we have previously
9 discussed this, but this falls under that category of
10 additional documents produced by Mr. McVearry as a
11 result of attempting to elicit his prefiled written
12 direct testimony.

13 I will say that based on our stipulation,
14 Exhibit 46, we do not need to move that into evidence
15 because --

16 MR. LANGLEY: Forty-five.

17 MR. CAMPBELL: Is it 45? Yes, 45.
18 Exhibit 45 is the process summary, and we do not need
19 that in evidence. We don't have a witness sponsoring
20 that testimony since we have reached the stipulation
21 with Complainants concerning the authenticity of the
22 Osmose data, and we'll put that stipulation in the

1 record at the end of the proceeding to be sure we are
2 all covered.

3 It was also captured in the notice of
4 intent to cross examine for both parties.

5 JUDGE SIPPEL: Well, that pretty much does
6 away with Exhibit No. 45. I would leave it in the
7 record just so we don't have to go through the
8 mechanics of striking something, but we're not going
9 to see this again.

10 MR. COOK: No. Agreed.

11 JUDGE SIPPEL: Now, 46, what have we got
12 with 46?

13 MR. COOK: Forty-six.

14 JUDGE SIPPEL: CDs.

15 MR. COOK: With the understanding that
16 these CDs are the same eight CDs that you produced to
17 us and subject to the general objection Mr. Seiver, we
18 have no further objection to 46.

19 MR. LANGLEY: Your Honor, we move to admit
20 Gulf Power Exhibits 38 through 46.

21 JUDGE SIPPEL: Okay, and by virtue of this
22 back-and-forth discussion, I'm satisfied that there's

1 a proffer here that is of relevance. The remaining
2 documents in Gulf Power's Notebook 3 of 5, which are
3 numbered 38 through 46, are deemed marked for
4 identification and are hereby received in evidence as
5 Gulf Power's Exhibits Nos. 38 through 46.

6 (Whereupon, the documents
7 referred to were marked as Gulf
8 Power Exhibit Nos. 38 through 46
9 for identification and were
10 received in evidence.)

11 JUDGE SIPPEL: Now we can move on to the
12 next notebook, which will be Notebook 4 of 5. Okay.
13 Is there a logical block of tabs here? Let's see if
14 Mr. Langley wants to.

15 Is there a particular block that would be
16 helpful to you?

17 MR. LANGLEY: I think there is. Forty-
18 seven through 55.

19 JUDGE SIPPEL: All right. Let's start
20 with that. Mr. Seiver, Mr. Cook, is there any
21 objection to anything in that block of documents, 47
22 to 55?

1 MR. SEIVER: Well, Your Honor, looking at
2 47 to 53, we have their replacement cost calculations
3 which are different from the ones that were produced
4 and subject to deposition. These are new documents
5 that we didn't see till Friday.

6 Ms. Davis' deposition, Mr. Dunn's
7 deposition, these were not available at that time. So
8 there was no question about them. I don't know to
9 what extent Ms. Davis or who the sponsoring witness
10 will be. Obviously at the hearing there will be an
11 opportunity to look at that.

12 But we object to new evidentiary exhibits
13 being sprung on us that are new calculations, you
14 know, on Friday.

15 JUDGE SIPPEL: Okay. Let's hear a
16 response to that. Mr. Langley?

17 MR. LANGLEY: These are not new
18 calculations at all. In fact, the calculations for
19 2000 through 2005 actually include something that they
20 had wanted but we had initially not produced, which
21 was the cost of capital information that was part of
22 our rate calculation.

1 So what we have here in 47 through 52 are
2 documents that, in essence, give them the additional
3 information that they had sought earlier at the time
4 of Terry Davis' deposition, but at which time we were
5 not able to give it to them.

6 But we were able to work through those
7 confidentiality concerns with the client and they now
8 have it.

9 JUDGE SIPPEL: So as I think Mr. Seiver's
10 objection was to 53, which is replacement cost
11 calculation, but you're saying that 47 through 52
12 gives him the background to that?

13 MR. LANGLEY: No, 47 through 52 are -- for
14 example, 47 is the 2000 calculation. Forty-eight is
15 the 2001 calculation. These are separate sets of
16 calculations for each year because the data changes
17 every year, and Exhibit 53 is the 2006 calculation,
18 and the reason they didn't have that before last week
19 is because the data on the Form 1 was just available
20 within the past couple of weeks.

21 JUDGE SIPPEL: All right. I hear you, Mr.
22 Seiver, but we're going to soldier through this, and

1 he did deliver the documents on the date that they
2 were due to be delivered, and again, if I find
3 something that really strikes me as being prejudicial,
4 I'll spend a lot of time on that, but I don't think
5 that this is in that category. Your objection is well
6 noted.

7 If there is nothing further on this, then
8 I'm going to handle 47 through 53 at this time. That
9 is, I'm going to instruct the reporter to mark these
10 for identification as Gulf Power Exhibit Nos. 47
11 through 53 and they are received in evidence at this
12 time as Gulf Power's Exhibits Nos. 55 (sic) through 53
13 as they appear in Notebook 4 of 5.

14 (Whereupon, the documents
15 referred to were marked as Gulf
16 Power Exhibit Nos. 47 through 53
17 for identification and were
18 received in evidence.)

19 JUDGE SIPPEL: Okay. Do you want to pick
20 another group?

21 MR. LANGLEY: Your Honor, to make sure I
22 heard you correctly, were 47 through 53 just admitted?

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1 JUDGE SIPPEL: Yes. If there's any
2 question about that, I'll repeat myself.

3 MR. CAMPBELL: I think we had a number
4 mix-up there, Your Honor. The court reporter will
5 note it, but I think you said 53 through 55 instead of
6 47 through 55.

7 JUDGE SIPPEL: Well, let me restate it
8 then. The documents which are tabbed Gulf Power
9 Exhibits 47 through 53, as they appear in Notebook 4
10 of 5, are marked for identification as Gulf Power
11 Exhibits 47 through 53 and are received in evidence as
12 Gulf Power Exhibits 47 through 53.

13 So that means that we start with Tab 54,
14 and if you want to select a reasonable block to take,
15 Mr. Langley.

16 MR. LANGLEY: How about 54 and 55? Gulf
17 Power moves to admit 54 and 55.

18 JUDGE SIPPEL: Do you have to give a
19 proffer of relevance, please?

20 MR. LANGLEY: Sure. Fifty-four is the
21 roll forward ledger for the year ending 2004. I think
22 it may actually have also been on the Complainants'

1 exhibit list, but I'm sure they'll correct me if I'm
2 wrong.

3 This data is relevant for two reasons.
4 Number one, it is part and parcel of the data used to
5 calculate the 2005 rate.

6 Second, it also breaks down by pole height
7 the number of in-service poles in Gulf Power's
8 distribution system, which I'm sure there's not going
9 to be agreement that this is relevant, but we contend
10 that it is highly relevant to demonstrate the finite
11 nature of Gulf Power's pole network.

12 JUDGE SIPPEL: Any objection?

13 MR. SEIVER: Well, Your Honor, I'm not
14 sure why the finite nature of the network. This is
15 not, again, pole by pole evidence of capacity or lost
16 opportunity, and Mr. Langley is correct. I do
17 remember seeing a roll forward ledger. I don't
18 believe it was this one, but I think we can deal with
19 that as we have to move forward.

20 And on 55 though -- did you address 55,
21 Mr. Langley? I forgot.

22 MR. LANGLEY: i did not address 55.